IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. OF 2004

IN

SUIT (LODGING) NO. 2702 OF 2004

Ashfaque Ul Haque Khan
Abdul Haque Khan & Ors. ..Plaintiffs

versus

Brihanmumbai Municipal
Corporation & Ors. ..Defendants

And

Iqbal Dawood Shaikh ..Intervener

Ms. M. V. Thakkar i/b. M/s. Gordhandas & Fozdar for the Plaintiffs.
Mr. K. N. Gaikwad for the Defendant No.1.
Mr. M. I. Sethna, Sr. Counsel with J.B. Mishra for the Intervenor.

CORAM : D. G. DESHPANDE,J.

DATE : 2ND DECEMBER,2004.

P.C. :

1. Heard learned counsel for the parties.

2. The only question that is to be decided at this juncture and in this notice of motion is

whether the plaintiffs succeed in proving that the structure in respect of which notice Exhibit 'O' and order Exhibit 'U' (hereinafter referred to as "the suit structure") is given, was constructed prior to 1996 or after 1996.

3. In 1993 BMC had issued notice to various tenants of the Dargah Trust including the present plaintiffs for demolition of the then existing structure alleging that they were unauthorised constructions. Plaintiffs and other 12 tenants therefore filed a suit before the City Civil Court vide suit No.4489 of 1993 and took out a notice of motion. The City Civil Court ordered maintainance of statusquo by order dated 19.8.1993. In that suit a plan showing all the structures of the 13 plaintiffs had came to be filed. Copy of that plan was given to me during the course of arguments. The suit structure is not shown in the said plan. It is to be clarified the suit structure has been subsequently referred to by the plaintiffs as 14A, the original House No.14 is shown in the said plan before the City Civil Court but 14A is not shown.

4. Therefore the case of the plaintiffs now is that 14A or the portion shown in the map of the present suit, in red, by the advocate for the plaintiffs and the structures in resepct of which

notice Exhibit 'O' and order Exhibit 'U' came to be passed are the same. There is no dispute about this so far as the case of the plaintiffs is concerned, therefore whenever I refer to the suit structure it means structure as 14A or the structure in respect of which notice Exhibit 'O' and Exhibit 'U' order has been passed.

5. The case of the plaintiffs in respect of the suit strcuture is that House No.14 was originally transferred to the plaintiffs by Jan Mohammad Safdarali in 1987. The structure of House No.14 was admeasuring 32 x 16 with loft admeasuring 21 x 15 and tank and latrine admeasuring 15 x 10 and open space admeausring 1322 sq. ft. Further the case of the plaintiffs is that on the backside of House No.14 there was an open land with dilapidated structure and she applied to the Trust to transfer the plot in her name on tenancy basis and also apply for carrying out repairs of the old structure which is now the suit structure i.e. House No.14A. It is her contention that permission to repair was granted on 30.1.1991 and thereafter the Plaintiffs had made construction. Therefore the notice and the Order Exhibits 'O' and 'U' are all illegal, so also the finding that the suit structure is not there after 1996.

6. Therefore the crucial question is whether the suit structure was in existence in 1991 or it came to be constructed in 1996, and my answer is against the plaintiffs, and to the effect that the suit structure is constructed after 1996 for the following reasons.

7. The first aspect that goes against the plaintiffs is that even if according to her the plaintiffs are accepted by the trust as tenant of 14A in 1991 and were granted permission to carry out repairs and that the Plaintiffs carried out the repairs in 1991, surprisingly enough in the suit filed by the plaintiffs before the City Civil Court, as stated above, along with 10 others and in the map filed thereto structure 14A is not shown. Secondly, during the course of arguments, counsel for the plaintiffs tendenred a plan in which structure 14A is shown in yellowish green. The structure on the face of it appears to be outside the area of House No.14. The portion marked in red by the plaintiffs counsel in the plaint is also outside the area of house No.14 and with reference to the suit before the High Court being Suit No.2297 of 1991 and the map filed therein the plaintiffs advocate pointed out some other area as referring to structure 14A.

8. Regarding the absnece of structure 14A in

the map filed before the City Cviil Court, counsel for the plaintiffs tried to contend that the map was not drawn by the expert but it was drawn by a young boy and therefore he could not show all the details of 14A. This explanation is not at all acceptable as this is an imporvement by the plaintiffs in their own case that structure 14A was there since 1991. Then nothing prevented the plaintiffs from showing 14A in the suit that came to be filed in 1993. It is also clear that the structure for which notice Exhibit 'E' has been given by the BMC as also order as Exhibit 'O' has been passed is not house No.14 but it is a totally different structure, referred to as 14A. This 14A is beyond the boundaries of house No.14.

9. It will also be therefore clear that at three different stages the plaintiffs have shown three different structures as 14A, and, 14A therefore was never in existence when the notice of motion in the earlier suit was taken out.

10. Counsel for the plaintiffs tried to contend that in the map filed in the High Court in the earlier suit they have referred to as House No.14 as having 1576 sq. ft. of area and this also covers 14A. Therefore, according to her even if 14A is not shown in the earlier map area still was with the

plaintiffs since 1991 and there is no encorachment as alleged by the BMC.

11. This contention of the plaintiffs has to be rejected because of total absence of any reference to 14A in the suit before the City Civil Court or in the suit before the High Court. It is clear that the plaitnfifs are trying to take advantange of their own shortcoming in the earlier litigation. There is no consistency in their case and all the three maps show the structure 14A at different places and in the map before the City Civil Court, there is no reference to 14A at all.

12. Counsel for the internvenor contended that on 9.6.1994 order of statusquo was given by the High Court and plaintiffs have violated the order of statusquo and made this construction. Counsel for the BMC on the other hand stated that structure referred to by the plaintiffs as 14A has not been recorded anywhere in the record of the BMC and according to him therefore structure 14A is a clear cut encroachment, the impugned order Exhibit 'U' of which came to be passed after giving personal hearing to the plaintiffs.

13. In the contempt petition No.99 of 2002 in Notice of Motion NO. 2858 OF 1993 in the earlier

Suit No. 2297 of 1991 giving directions to the Corporation to undertake enquiry as to whether any demolition and/or new construction on the suit property or the extension of the suit structure standing on the property has been effected after 19.7.1994 and court also further directed that after that finding has reached by the corporation, the court may take necessary steps to remedy the mischief as permissible by the Municipal law.

14. A perusal of the contempt petition No. 99 of 2003 shows that this contempt petition No.99 of 1993 was initiated by Iqbal Dawood Shaikh against Ashfaq Ul Haqkhan Abdul Haqkhan, who is plaintiff in the suit and others. It was the contention of the petitioner that when the petitioner and the contemnor No.1 along with four others filed a Long Cause Suit No.2297 of 1991 and a notice of motion No.2858 of 1993 was taken out, the suit was for declaration on the basis of adverse possession and permanent injunction against the original defendant No.1 and others. The petitioner further stated that when the notice of motion came for hearing before Justice Agarwal, and the order came to be passed on 19.7.1994 that parties to the suit will maintain statusquo and will not demolish and/or construct on the suit property or alter the structure standing on the property, pending the suit. However, it was the

case of the petitioner that after this order the contemnor No.1, that is who is the plaintiff in the suit on lodging number, carried out construction work of permanent nature on the land and he was asked to demolish the structure but the contemnor no.1 did not pay any attention.

15. It will be therefore clear that the parties who were plaintiffs earlier in suit No.2297 of 1991 became antagonize and the petitioner as a contemnor has taken out contempt petition against his co-plaintiff. This speaks volume about the conduct of the parties and it was in this contempt petition that the subsequent order of Justice Agarwal, referred to by me, came to be passed.

16. It will be therefore clear that there was an order of maintaining statusquo by Justice Agarwal but inspite of that order, the plaintiffs in the present suit, made addition or alteration by constructing structure 14A. The case of the present plaintiffs that structure 14A was there since before the order of Justice Agarwal, is not only not supported by documents but is falsified by their own documents, referred to above, i.e. three maps tendered and therefore the plaintiffs have failed to make out prima facie case or show any illegality in that notice or the order. Hence ad interim prayer

is rejected. Notice of Motion is dismissed.

17. Counsel for the plaintiffs undertakes to register the suit and the notice of motion.

(D. G. DESHPANDE, J.)

. After this order was pronounced, counsel for the Plaintiffs prayed for stay of operation of this order and also for continuation of statusquo because the statusquo is in existence quite since long. The prayer was opposed by the counsel for the Defendants. However, in the circumstances, this order is stayed for two weeks from today and statusquo is continued for a period of two weeks from today.

2.12.2004 (D. G. DESHPANDE, J.)